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No. 07-1047

FILED
MAY 9 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MAINSTREET ORGANIZATION OF REALTORS®,
successor by name change to REALTOR® ASSOCIATION
OF WEST/SOUTH SUBURBAN CHICAGOLAND,

Petitioner,

v.

CALUMET CITY, ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Introduction	1
Argument	2
I. The Seventh Circuit Violated Association's Due Process Rights By Adversely Deciding Prudential Standing *Sua Sponte* Without Giving Association The Right To File A Brief On The Issue	2
II. The Court Should Resolve The Conflict Amongst The Circuits Regarding Whether A Court Of Appeals Can Consider Prudential Standing *Sua Sponte*	4
III. The Court Should Resolve The Open Issue Of Whether An Association Of Real Estate Brokers Has Associational And Prudential Standing To Challenge The Constitutionality Of A Municipal Ordinance That Unreasonably Restricts The Right To Freely Sell Private Property	8
A. Close Relationship Between Brokers And Their Clients	8
B. Existence Of Obstacles	10
Conclusion	13

TABLE OF AUTHORITIES

Page

CASES

Animal Legal Defense Fund, Inc. v. Espy, 29 F.3d 720 (D.C. Cir. 1994) 6

Burns v. United States, 501 U.S. 129 (1991) 2, 3

Caplin & Drysdale v. United States, 491 U.S. 617 (1989) 9

Community First Bank v. National Credit Union Admin., 41 F.3d 1050 (6th Cir. 1994) 6

Council of Ins. Agents & Brokers v. Juarbe-Jimenez, 363 F. Supp. 2d 47 (D.P.R. 2005) 12

Craig v. Boren, 429 U.S. 190 (1976) 9

Day v. McDonough, 547 U.S. 198 (2006) 1, 2, 3

International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock, 477 U.S. 274 (1986) 10

Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379 (1884) 5

Mathews v. Eldridge, 424 U.S. 319 (1976) 4

McLauchlan v. Prudential Ins. Co. of America, 970 F.2d 357 (7th Cir. 1992) 3

Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co., 219 F.3d 895 (9th Cir. 2000) 6

Powers v. Ohio, 499 U.S. 400 (1991) 12

Rawoof v. Texor Petroleum Co., 2008 U.S. App. LEXIS 7359 (7th Cir. 2008) 6

TABLE OF AUTHORITIES – Continued

Page

Singleton v. Wulff, 428 U.S. 106 (1976) 8, 9, 10, 12

Thompson v. County of Franklin, 15 F.3d 245 (2d Cir. 1994) 6

United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999) 3

Warth v. Seldin, 422 U.S. 490 (1975) 5

INTRODUCTION

The Court should grant review in this case because: (1) the Seventh Circuit violated Association's[1] due process rights and ignored *Day v. McDonough*, 547 U.S. 198, 210 (2006), because it did not permit Association to brief whether Association had prudential standing, which the Seventh Circuit raised *sua sponte* after City conceded it on appeal, prior to decision, (2) the Court should resolve the split between the Circuits regarding whether a Court of Appeals can consider prudential standing *sua sponte* if the district court has considered the issue and the appellant has conceded it on appeal, and (3) the Court has not yet decided the important issue of whether an association of real estate brokers, who enter into exclusive right to sell contracts with their clients, has associational and prudential standing to challenge the constitutionality of a municipal ordinance that unreasonably restricts property owners' rights to sell property.

City's Opposition fails to present any reasons why the Court should not decide these important issues. Instead, City attempts to confuse the issues, mischaracterizes Association's positions, misstates the law, and fails to inform the Court of material developments since Association filed its Petition. Below we address City's arguments in the order that we addressed the issues in the Petition.

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[1] We use the same defined terms and citation format as used in our Petition.

ARGUMENT

I. The Seventh Circuit Violated Association's Due Process Rights By Adversely Deciding Prudential Standing *Sua Sponte* Without Giving Association The Right To File A Brief On The Issue.

Day unequivocally held that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 210; *see also Burns v. United States*, 501 U.S. 129, 137-38 (1991) (accord). The due process right protected in *Day* is critical to our adversarial legal system. Courts should decide issues presented by litigants; they should not decide issues without input from the parties. Even if the Court raises an issue *sua sponte*, to comply with due process, it must give the parties an opportunity to be heard on that issue. The Seventh Circuit plainly did not accord Association the right to be heard on prudential standing. Indeed, the Seventh Circuit explicitly rejected Association's request to be heard when it denied Association's motion to file a supplemental brief.

Each of the three points City raises in response to Association's argument is without merit. First, City argues that the right to be heard discussed in *Day* and *Burns* does not apply here because those cases did not involve prudential standing. Opposition, 22-23. City misses the point. The right to be heard is guaranteed by the due process clause and applies to any issue that affects life, liberty or property. Said differently, litigants have an equal right to be heard

regardless of whether the legal issue is the application of the statute of limitations (*Day*), modification of sentencing guidelines (*Burns*) or whether a party has prudential standing (this case).

Second, City argues that Association had "no due process right to submit a supplemental appellate brief" because Association knew that the Seventh Circuit could raise standing "at any time" and thus presumably should have briefed prudential standing in its main appeal briefs. Opposition, 22, 24. Surely that cannot be the rule. Association prevailed in the district court. City conceded prudential standing in its appeal brief and the Seventh Circuit had twice ruled that it could not raise prudential standing *sua sponte*. *McLauchlan v. Prudential Ins. Co. of America*, 970 F.2d 357, 359 n.1 (7th Cir. 1992) (where appellant concedes prudential standing on appeal, the appellate court "may not raise prudential standing issues *sua sponte*"); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 611 (7th Cir. 1999). Accordingly, there was no possible need for Association to address prudential standing in its main briefs.

Finally, City argues that Association had a chance to be heard because, after argument and prior to decision, Association filed a motion seeking leave to file a brief on standing which outlined issues it wanted to argue. City makes the astonishing argument that "Association was able to present its arguments to the court . . . and clearly the court did not disregard them." Opposition, 25-26. City fails to

explain that a single judge – not the Panel – *denied* Association's motion for leave to file a brief on standing *after* the Court had decided the issue adversely to Association. App. 31-32. Similarly, City argues that Association had the right to present its arguments in its Petition for Rehearing. Opposition, 24-26. But due process requires that parties be given the opportunity to be heard *before* a Court decides an issue. As the Court has ruled, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Petitions for Rehearing are almost never granted and the Seventh Circuit denied Association's petition here. Surely, due process requires more than the opportunity to file an almost always futile brief after a Court of Appeals has already ruled.

II. The Court Should Resolve The Conflict Amongst The Circuits Regarding Whether A Court Of Appeals Can Consider Prudential Standing *Sua Sponte*.

There is undisputedly a conflict among the Circuits regarding whether a Court of Appeals can consider prudential standing *sua sponte*. The Court should resolve this conflict and hold that, if a district court has considered prudential standing and an appellant concedes the issue on appeal, the Court of Appeals may not consider the issue *sua sponte*. City responds to Association's argument by claiming that this Court has already decided the issue, that there is

"not really" a conflict, and that the rule proposed by Association would permit parties to collude to create standing. City's arguments lack merit.

The cases cited by City, *Warth v. Seldin*, 422 U.S. 490 (1975), and *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884), confirm that the Court has never decided whether a Court of Appeals can raise prudential standing *sua sponte* if the district court has decided the issue and the appellant concedes it on appeal. *Warth* holds that standing is a threshold issue that a court must decide at the outset of litigation. *Mansfield* addresses whether a Court must consider Article III standing – specifically whether a case was properly removed from state court on diversity grounds when the litigants were citizens of the same state at the time the case was filed – on its own, even if not raised by a party. Neither *Warth* nor *Mansfield* says anything about whether a Court of Appeals can raise prudential standing *sua sponte* if the appellant concedes the issue after the District Court decides it.

City's argument that there is "not really" a conflict amongst the Circuits is easily disposed of. Indeed, since Association filed its Petition, the conflict amongst the Circuits (and the accompanying confusion) has become more stark. There are now three separate rules followed by various Circuits regarding whether a Court of Appeals must, may not, or may, consider prudential standing *sua sponte*.

As confirmed by City, at least the Second, Sixth, and D.C. Circuits have held that a Court of Appeals

must consider prudential standing *sua sponte*. *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994); *Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994).

Contrary to City's position, the Ninth Circuit has plainly held that prudential standing can be waived and that the Court of Appeals *may not* consider the issue *sua sponte* if it has been waived. *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000). City's tortured analysis of *Pershing Park* – that the Ninth Circuit only held that "a party's failure to raise the issue of prudential standing *may* constitute a waiver" (Opposition, 17) – must be rejected. The Ninth Circuit plainly held: "[b]ecause issues of constitutional standing are jurisdictional, they must be addressed whenever raised. By contrast, a party waives objections to nonconstitutional [prudential] standing not properly raised before the district court." *Id.* at 899 (citations omitted).

Finally, since Association filed its Petition, the Seventh Circuit in *Rawoof v. Texor Petroleum Co.*, 2008 U.S. App. LEXIS 7359 (7th Cir. 2008), has adopted yet a third rule, namely that a Court of Appeals "*may raise* an unpreserved prudential-standing question on its own, but unlike questions of constitutional standing, *it is not obliged to do so.*" *Id.*,

2008 U.S. App. LEXIS 7359, at *13 (citing the Seventh Circuit's opinion in this case) (emphasis added).[2]

Finally, City mischaracterizes the rule advocated by Association. City posits that, if courts cannot consider prudential standing *sua sponte*, parties could collude to create standing. City's fears are misguided. Association's position is that where a district court has considered prudential standing and the defendant concedes the issue on appeal, the Court of Appeals ought not be permitted to raise the issue *sua sponte*. Association concedes that a district court can always raise prudential standing *sua sponte*. Indeed, that is exactly what happened in this case. After multiple briefs and arguments requested by the district court, the district court carefully considered the facts and circumstances associated with Association's Members' rights and claims and decided the "threshold" standing issue in Association's favor. City decided to not appeal that determination. Association submits that, under such facts, a Court of Appeals ought not be permitted to raise the issue on its own (and certainly should not decide it without (1) any factual record, and (2) giving the parties the opportunity to present facts and argument bearing on the issue).

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[2] Contrary to City's argument, Association does not argue that the Seventh Circuit's position is unclear on this issue. Rather, our point is that the Seventh Circuit reversed itself on the issue during Association's case. The Seventh Circuit's flip flop is further proof that the Circuits need guidance from the Court.

III. The Court Should Resolve The Open Issue Of Whether An Association Of Real Estate Brokers Has Associational And Prudential Standing To Challenge The Constitutionality Of A Municipal Ordinance That Unreasonably Restricts The Right To Freely Sell Private Property.

City offers no reason why the Court should not decide the important issue of whether an association of real estate brokers should be permitted to prosecute this case. The Seventh Circuit plainly reached the wrong answer to that question (not surprisingly, because it refused to permit Association to present the facts and settled law that establish prudential and associational standing). The Court should correct the Seventh Circuit's mistake before it is used by courts to further erode well-established principles of prudential and associational standing.

City argues that Association cannot satisfy the "close relationship" and "existence of obstacles" requirements of *Singleton v. Wulff*, 428 U.S. 106 (1976), to establish prudential standing. City's points are both meritless.

A. Close Relationship Between Brokers And Their Clients.

City states that there is no close relationship between real estate brokers and their clients because "there is no indication in the record that any Association member entered into a contractual relationship

with City homeowners." Opposition, 30. That statement is false. Association's Verified Complaint plainly alleges that Association's Members enter into exclusive right to sell agreements with their clients. Nothing could establish a closer relationship between a homeowner and agent regarding the transfer of property than an exclusive contractual relationship.

City also argues that the relationship between a homeowner and a realtor "is not the type of intimate relationship comparable to that between a patient and doctor. A patient and doctor have a private, confidential, and personal relationship that is integral to a patient's well-being. The homeowner and realtor have a limited business arrangement." Opposition, 30. City, however, ignores other cited authorities in which the Court identified "close relationships" that satisfy *Singleton*. Surely City would not claim that the beer vendor and consumer in *Craig v. Boren*, 429 U.S. 190, 192-94 (1976), had an "intimate" or "private, confidential and personal" relationship that is "integral to a [person's] well-being." Similarly, the lawyer-client relationship in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), is a "limited business arrangement" akin to that between homeowners and real estate brokers. The common features of all relationships in which the Court has found the requisite close relationship are that the activities of the two parties are "inextricably bound" together and that one party hires another to perform a task he is licensed to do. Real estate brokers are fiduciaries to their clients and licensed by the state.

Their relationship with their clients thus falls within the type of relationship that satisfies *Singleton*. Homeowners who want to sell their property enter into contracts with their licensed brokers that grant the brokers the exclusive right to sell the property. In effect, the broker is assigned a percentage of the sale proceeds. Nothing could be more "inextricably bound" together than that.

B. Existence Of Obstacles.

In support of its argument that there are no obstacles to homeowners challenging the constitutionality of the Ordinance on their own, City cites the pendency of the action filed by Ayanna Walker after the Seventh Circuit's decision in this case. What City fails to disclose is that the *Walker* case vividly demonstrates the immense obstacles a homeowner faces if she tries to sue on her own (either individually or on behalf of a class, as suggested by the Seventh Circuit). The *Walker* case also proves correct the Court's recognition that associational suits have substantial advantages over class actions. *See International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock*, 477 U.S. 274, 289-90 (1986).

The *Walker* case, filed October 31, 2007, sought the same relief that the Association sought in its case. Since the *Walker* complaint was filed, City has manipulated the proceedings to delay consideration of Walker's motions for a preliminary injunction and

class certification. City raised every conceivable obstacle to prevent Walker from prosecuting her case, all at considerable expense. As the district court was finally preparing to rule on class certification and turn to Walker's request for a preliminary injunction, City unilaterally volunteered to not enforce the Ordinance against Walker as a way to moot her claim and render her inadequate as a class representative. The Ordinance remains in effect as to all other property owners trying to sell their homes. On May 6, 2008, more than six months after the case was filed and without any substantive issues being decided, City persuaded the district court to dismiss Walker's claim on mootness grounds. Of course, if another property owner decides to take on the considerable burden of suing City so that they can sell their home without unreasonable governmental interference, nothing can stop City from again deciding to selectively not enforce the Ordinance against that property owner too, thereby forever foreclosing judicial examination of the constitutionality of the Ordinance. Alternatively, in more favorable markets, a residence is likely to sell in much less time than the six months the *Walker* action was pending. As the events in the *Walker* litigation prove, there are considerable, and indeed, perhaps insurmountable obstacles to individual homeowners suing City to challenge the Ordinance.

In contrast, by allowing Association to prosecute this case, the Court would ensure prompt and efficient resolution of important constitutional issues

that affect every property owner and real estate broker in City. The events of Association's case leading to the Seventh Circuit's decision prove this point. Association filed its facial challenge to the constitutionality of the Ordinance on April 24, 2006. By December 8, 2006, Association had obtained two preliminary injunctions against enforcement of the Ordinance (due to City's amendments to the Ordinance). Accordingly, in less than eight months with Association as the plaintiff, the litigants were able to address the constitutionality of the Ordinance and obtain an appealable order.

City also argues incorrectly that "the only real 'burden' the Association contends inhibits the homeowners from raising their own rights is money. . . . Such a burden is insufficient to ignore or relax the rules of prudential standing." Opposition, 31. City is wrong on both counts. First, the obstacles facing homeowners need not be "insurmountable." *Singleton*, 428 U.S. at 117. There must only be some hindrance to the third party's ability to protect his or her own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Courts have recognized that financial burdens of pursuing litigation can satisfy *Singleton*. *Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 363 F. Supp. 2d 47, 53 (D.P.R. 2005), *aff'd*, 443 F.3d 103 (1st Cir. 2006).

Second, City completely ignores Association's other argument that individual homeowners face the obstacle of a homeowner's claim becoming moot because a sale is closed, the seller decides to simply comply with City's repair order because those costs

are a fraction of litigation costs, or, as is the case with Walker, the City unilaterally decides not to enforce the Ordinance in an effort to "pick-off" homeowner plaintiffs' ability to challenge the Ordinance.

Because the Seventh Circuit plainly erred in denying Association standing and, in doing so, misapplied the Court's long-standing precedent on prudential and associational standing, the Court should grant review to prevent further erosion of well settled law. If the Seventh Circuit's opinion is allowed to stand, important constitutional rights will continue to be violated and access to courts to protect constitutional rights will be severely restricted.

CONCLUSION

Association requests that the Court grant Association's Petition. Because Association was denied due process, at a minimum, the Court should grant the Petition, vacate the Seventh Circuit's judgment and opinion and remand the case for further proceedings that comply with due process.

Dated: May 9, 2008

Respectfully submitted,

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